In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1252

GEORGE W. POLLEN, PETITIONER

v.

PAUL H. PRESTON, SUPERINTENDENT, WASHINGTON ASYLUM AND JAIL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 13–14) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1965. A petition for rehearing *en banc* was denied on January 25, 1966. The petition for a writ of certiorari was filed on April 25, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

218-653—66

QUESTION PRESENTED

Whether petitioner could obtain review in a district court of the denial by the District of Columbia Court of General Sessions of his motion to vacate sentence when he had not appealed from that denial to the District of Columbia Municipal Court of Appeals.

STATEMENT

On April 17, 1964, petitioner was charged by information in the District of Columbia Court of General Sessions with simple assault and with carrying a dangerous weapon, in violation of 22 D.C. Code 504 and 3204. He entered a plea of not guilty and demanded a jury trial. On May 21, 1964, petitioner's retained counsel withdrew the demand for a jury trial. On June 4–5, petitioner was tried and convicted on both charges by a judge of the Court of General Sessions sitting without a jury. On July 28, he was sentenced to jail for a period of 120 days on each count, to run concurrently, with the proviso that credit would be given for some 35 days already spent in custody. Appeal was taken on various grounds unrelated to petitioner's waiver of a jury trial. The District of Columbia Municipal Court of Appeals affirmed the convictions on February 19, 1965. *Pollen* v. *United States,* 207 A. 2d 114.

On March 15, 1965, petitioner, with newly retained counsel, filed a motion in the Court of General Sessions to set aside and vacate the sentences on the ground that he had not intelligently waived his right to a jury trial. This motion was denied without a hearing on March 24, 1965, and petitioner was taken into custody on March 29, 1965. On March 31, peti-

tioner applied in the United States District Court for the District of Columbia for a writ of habeas corpus, alleging that he had been denied a jury trial without intelligent waiver.[1] The district court dismissed the petition on the ground that petitioner had failed to exhaust his available legal remedies. It set bail pending appeal at $1000 (J.A. 13). The United States Court of Appeals for the District of Columbia Circuit affirmed the dismissal *per curiam*, noting that a motion to vacate sentence and appeal from a denial thereof to the District of Columbia Municipal Court of Appeals was the "remedy available * * * by which to test the validity of [petitioner's] detention" (Pet. App. 13–14).

ARGUMENT

The district court correctly concluded that petitioner must exhaust his remedy of appeal to the District of Columbia Municipal Court of Apepals from the denial of his motion to vacate sentence before habeas corpus would be available (Pet. 11–12). A motion to vacate sentence in the Court of General Sessions is similar in nature and scope to the federal proceeding under 28 U.S.C. 2255.[2] Rule 27(d) of the Rules of the District

[1] At the time when the petition for habeas corpus was filed, the time for appeal (ten days) from the denial of the motion to vacate sentence had not lapsed. Rule 27 (b), (d) of the Rules of the District of Columbia Municipal Court of Appeals.

[2] The District of Columbia Municipal Court of Appeals has held that 28 U.S.C. 2255 is not applicable to the Court of General Sessions but that that court has the inherent power to entertain a motion to vacate a sentence. *Ingols* v. *District of Columbia*, 103 A. 2d 879 (D.C. Mun. Ct. App.); see *Burke* v. *United States*, 103 A. 2d 347 (D.C. Mun. Ct. App.); *cf. Morgan* v. *United States*, 346 U.S. 502.

of Columbia Municipal Court of Appeals provides for appeal of an adverse ruling on such a motion. Resort to habeas corpus under these circumstances is clearly improper (*United States* v. *Hayman,* 342 U.S. 205; *Adams* v. *United States ex rel. McCann,* 317 U.S. 269; *United States ex rel. Kennedy* v. *Tyler,* 269 U.S. 13) since the remedy provided by habeas corpus is not intended to bypass orderly procedures in local court systems. *Fay* v. *Noia,* 372 U.S. 391, 418–420; *Wade* v. *Mayo,* 334 U.S. 672, 677–680; *Ex parte Hawk,* 321 U.S. 114, 116–118; *Mooney* v. *Holohan,* 294 U.S. 103. By applying for habeas corpus in the district court, petitioner has, in effect, sought review in that court of a decision of the Court of General Sessions, whereas such review has been assigned by Congress to the District of Columbia Municipal Court of Appeals.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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